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No. 84-_____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

STANFORD MONROE WELCKER,

Petitioner,

- versus -

THE UNITED STATES,

Respondent.

PETITION

For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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- QUESTION PRESENTED -

Whether this Court's decision in United States v. Kubrick, 444 U.S. 111 (1979), holding that a claim against the United States accrues when a reasonable plaintiff should know of both the injury and its cause, applies to causes of action not sounding in tort?

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In the
SUPREME COURT OF THE UNITED STATES

October Term, 1984

STANFORD MONROE WELCKER, Petitioner,

- versus -

THE UNITED STATES, Respondent.

- PETITION -

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Stanford Monroe Welcker hereby petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit at docket number 84-1392.

- OPINIONS BELOW -

The opinion of the court of appeals (1a) is reported at 752 F.2d 1577. The opinion of the United States Claims Court (26a) is not reported.

- JURISDICTION -

The judgment of the court of appeals (33a) was entered on January 22, 1985. An order denying a petition for rehearing (34a) was entered on March 11, 1985.

Certiorari judisdiction exists pursuant to 28 U.S.C. § 1254(1).

- STATUTES INVOLVED -

28 U.S.C. § 2401(a) provides, in pertinent part, "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

28 U.S.C. § 2501 provides, in pertinent part, "Every claim of which the United States Claims Court has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

- STATEMENT OF THE CASE -

A. Public Events

Stanford Monroe Welcker, a civil service draftsman at Watson Air Force Laboratory, was charged during the McCarthy Era with disloyalty and thereupon suspended from work without pay. He exercised his right under Pub.L. 77-808 § 3, 56 Stat. 1053 (3a), to a hearing.

One disputed issue in the ensuing proceedings was whether Mr. Welcker had attended a few meetings of the Walt Whitman Club as an adherent to its communistic philosophy, or had gone to them as an informant for the FBI and the Army. A related issue was whether Mr. Welcker had been at the

local YMCA on other occasions to attend Walt Whitman Club meetings or for innocuous activities as vice president of a labor union which also rented meeting space at the YMCA.

After an initial hearing at the Watson Laboratory, a loyalty-security board ruled that Mr. Welcker was not disloyal but that he was a security risk. Welcker's suspension from work thereupon became a discharge.

An appeal was taken to the Air Force Central Loyalty-Security Board. It conducted a hearing at the Pentagon on July 27, 1950.

Evidently the appeal board was impressed most favorably with Mr.

Welcker's presentation.[1] Even though Welcker's attorney allowed that because of the outbreak of war in

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[1]. Mr. Welcker did not just account for his own actions. He also suggested that any contrary information which the board had received, if not the product of mistake, was surely the product of racism.

Mr. Welcker had been outspoken in demanding full compliance with President Truman's Executive Order ending segregated military facilities. For example, he had complained to the commander of Fort Monmouth about the exclusion of blacks from recreation facilities. Mr. Welcker also had been president of the local NAACP chapter, which had grown under his leadership to 800 members. In that capacity, he had blocked efforts of communist groups to infiltrate NAACP activities, and he had been singularly responsible for the peaceful, voluntary integration of the local public school systems.

These activities were not exactly appreciated in all quarters, and Mr. Welcker long had assumed that the false allegations of subversive activities which cost him his career had been the product of racism. As plaintiff made clear in an affidavit of record, he had "never imagined, let alone believed, that F.B.I. agents had intentionally misled the members of the [Air Force Central Loyalty-Security] board, or that they had been directed to do so by J. Edgar Hoover."

Korea all doubts should be resolved in favor of the government, the board saw fit to withhold any decision for two and a half years while it made a number of ex parte inquiries of the FBI.[2] Then, in 1953, after reviewing the FBI's secret post-hearing submissions, the Air Force made a final determination that Mr. Welcker was loyal to his country but nonetheless was a security risk. The earlier discharge from employment thereupon became permanent.

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2. Documents disclosed under the Privacy Act make specific reference to one post-hearing inquiry prior to September 20, 1951, and to another one dated June 10, 1952. The Privacy Act disclosures were far from complete, and the trial court would not compel further disclosures. Hence there may well have been additional post-hearing inquiries addressed to the FBI.

B. Privacy Act Disclosures

Although the Air Force appeal board had every reason to assume that in responding to its inquiries the FBI had adhered to its usual role as a neutral investigator, that simply was not so. Partial disclosures of FBI files first obtained in 1981 under the aegis of the Privacy Act of 1974, 5 U.S.C. § 552a, demonstrate this.

These documents show that J. Edgar Hoover told FBI field offices that he only wanted information reflecting "adversely" on petitioner's loyalty. Hoover withheld from the Air Force information supporting Mr. Welcker's testimony and in its place substituted fabricated accounts which were designed to undermine the Air Force

board's search for the truth.[3]

In particular, the Newark FBI office informed FBI headquarters that during observation of activities at the YMCA there had been "some general confusion" between the Walt Whitman Club and Welcker's union, and that the

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3. The reason for the FBI Director's animus toward Petitioner is not clear. What is clear is that Hoover's efforts at obfuscation commenced prior to the Watson Lab hearing. Specifically, Petitioner's attorney had written to the FBI director seeking confirmation that Mr. Welcker had indeed attended Walt Whitman Club meetings in 1944 at the behest of the FBI. Hoover, however, received word that an Air Force general wanted "to dismiss Welcker . . . and not have the Bureau agent or Army officer [who had recruited Welcker as an informant] testify" because this might "give Welcker or his attorney the opportunity to make 'another Coplon case' of this at the hearings." Hoover then drafted a response to counsel's request which went out over the signature of an assistant attorney general. The response falsely denied that Petitioner's attendance at Walt Whitman Club meetings "was at the request of this Department, and for the benefit of the Government."

resulting list of surveilled subversives which had been sent to the Air Force was known to be unreliable. Hoover concealed this crucial information from the Air Force and manufactured for it a story that gave exactly the opposite impression. Specifically, the FBI Director advised the Air Force that when Welcker was first contacted by the FBI and Army Intelligence, he had been told "that they were not interested in his union activities or the activities of the union itself." There is no evidence which supports that assertion.

Mr. Hoover also directed field agents to deny, falsely, that Petitioner had ever been an informant, and he instructed the agents not to

submit to the Air Force any material at variance with an affidavit of Army Intelligence Lieutenant Allen, because the Air Force was trying to "resolv[e] discrepancies between Welcker's testimony and the statement of Allen." Hoover even asked for documentation that would portray Welcker's attorney to the Air Force as a communist.

C. Judicial Proceedings

After reviewing the materials obtained from the FBI under the Privacy Act, Petititoner promptly brought suit in the Court of Claims. Invoking jurisdiction provided by 28 U.S.C. § 1491, he complained of wrongful discharge from civilian Air Force employment and demanded back pay and related equitable relief.

Welcker's petition was dismissed on summary judgment by the successor court, the United States Claims Court. Relying primarily upon a pre-Kubrick decision, Braude v. United States, 585 F.2d 1049 (Ct. Cl. 1978), it held that limitations had long since run.

On appeal, Petitioner allowed that he was untimely as to most causes of action relating to his loss of employment, but insisted that he brought suit on time as to one cause of action. Specifically, since the FBI had taken a partisan interest in the outcome, its post-hearing ex parte contacts with the decision-maker, of which Petitioner had no contemporaneous knowledge, deprived Mr. Welcker of a fair hearing in

contravention of the Due Process Clause of the Fifth Amendment. Sullivan v. Department of the Navy, 720 F.2d 1266, 1274 (Fed. Cir. 1983).[4] The existence of Petitioner's Sullivan cause of action could not have been discovered prior to the Privacy Act disclosures, because the proofs that the FBI was not disinterested in the outcome lay solely in internal FBI documents which had never been available to the Air Force, let alone to Mr. Welcker. Consequently, Petitioner argued on appeal that his Sullivan claim did not

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4. These secret post-hearing communications had been especially prejudicial, because the FBI conveyed information known to be false and misleading, and did so in order to frustrate the truth-finding process.

accrue until he could obtain Privacy Act access to internal FBI documents, and therefore this particular cause of action was not time barred.

The court of appeals disagreed. Painting with a broad brush, it held that in 1953 Petitioner knew he had been fired, knew he had been fired for being a security risk, and knew that this was done because of his attendance at Walt Whitman Club meetings. Since Petitioner could have litigated his discharge on a number of grounds during the 'fifties, the Federal Circuit would not entertain any challenge at this late date.

The court of appeals, therefore, implicitly held that it made no difference that each of the facts

essential to a Sullivan cause of action[5] -- that the FBI at its highest

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5. The panel below implied that Sullivan should be understood to require that if ex parte contacts are not in violation of a statute or regulation, there is no constitutional claim (20a-22a). The Sullivan decision, however, unequivocally held that ex parte contacts with a decision-maker by a non-neutral party worked a per se denial of due process: "We hold that Westbrock's improper ex parte communications were not only unfair, but also denied Petitioner his rights under the due process clause of the Constitution". (720 F.2d at 1274). This holding is merely a special case of the general rule that the right to a hearing always implies the right to a meaningful hearing.

Sullivan's constitutional holding, of course, was binding precedent upon the panel below. It evidently was recognized as such, for the panel's opinion never addresses the FBI's post-hearing communications to the Air Force. Petitioner premises his Sullivan claim on those communications, and not on the pre-hearing reports discussed in the opinion. The lengthy post-hearing inquiry made by the Air Force demonstrates that Petitioner had responded effectively to the initial accusations.

level[6] had assumed a partisan role and had intentionally corrupted the fact-inding process in its post-hearing responses to Air Force inquiries -- was not known and could not have been obtained until many years after Mr. Welcker was discharged. Time

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6. The documents which Petitioner proffered to the trial court made clear that the post-hearing FBI submissions, unlike the evidence upon which the disloyalty charge originally had been based, were the product of official policy from on high and did not reflect random, unauthorized acts on the part of low level employees. Cf. Hudson v. Palmer, ___U.S.___, 104 S.Ct. 3194, 3203, 82 L.Ed.2d 393 (1984)(no liability under 42 U.S.C. § 1983 for random, unauthorized acts). This may be significant to the limitations question presented, since in some cases at least one one court of appeals engrafts onto Kubrick two additional requirements: "that the plaintiff must show fraudulent concealment of the critical facts before accrual will be postponed," and "that the United States itself played a wrongful role in concealing the culprit's identity." Diminnie v. United States, 728 F.2d 301, 305 (6th Cir. 1984).

therefore ran out on the Sullivan cause of action long before the day arrived when Petitioner "need only have made inquiry among [lawyers] with average training and experience in such matters to discover that he probably had a good cause of action." United States v. Kubrick, 444 U.S. 111, 122-23 (1979).

REASON FOR GRANTING THE WRIT

THERE IS CONFLICT AND CONFUSION AMONG THE CIRCUITS AS TO WHEN SOME FEDERAL CAUSES OF ACTION ACCRUE

In United States v. Kubrick, 444 U.S. 111 (1979), a medical malpractice case arising under the Federal Tort Claims Act, 28 U.S.C. § 1371, this Court specified the point at which a claim against the United States accrues and limitations therefore begins to run. Kubrick held that when a plaintiff is in "possession of the critical facts that he has been hurt and who has inflicted the injury," he is charged with knowledge of both the fact of the injury and its causation (444 U.S. at 122).

A. Most of the circuits apply Kubrick to all types of federal claims, and hold that when the fact of injury is known but its causation is not known, a claim against the United States has not accrued and limitations therefore has not begun to run. See Barrett v. United States, 689 F.2d 324, 327 (2d Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983) (collecting cases). Barrett, 689 F.2d at 327, specifically adopts the pre-Kubrick holding of the District of Columbia Circuit in Fitzgerald v. Seamans, 553 F.2d 220, 228 (1977):

> Read into every federal statute of limitations . . . is the equitable doctrine that in case of defendant's fraud or deliberate concealment of material facts

> relating to his wrongdoing, time does not begin to run until plaintiff discovers, or by reasonable diligence could have discovered the basis of the lawsuit.

B. In Ware v. United States, 626 F.2d 1270 (5th Cir. 1980), the plaintiff immediately knew that his cattle had been destroyed and that this was done by the United States Department of Agriculture because it had determined that the cattle had tuberculosis. Later, Ware learned that 243 of the 246 destroyed cattle had been misdiagnosed and should not have been destroyed.

Faced with these facts, the Fifth Circuit read Kubrick as being applicable only to medical malpractice cases, which the court viewed as being

sui generis (626 F.2d at 1284 n.4). The Ware court therefore eschewed applying Kubrick when it determined that Ware's claim of negligent destruction of his herd first accrued. Nevertheless, it held that limitations did not begin to run until Ware, learned the singularly essential fact that the tuberculosis diagnosis had been faulty (626 F.2d at 1283-85).

C. The Ware limitations holding is in direct conflict with the holding below. Mr. Ware knew at the time of the slaughter that his cattle had been killed, why they were killed, and who killed them, just as surely as Mr. Welcker knew in 1953 that he had been fired, why he had been fired, and who fired him. Neither of these

plaintiffs, however, immediately knew the causal facts which would probably sustain a claim against the United States. Mr. Ware had no immediate reason to suspect a laboratory error; Mr. Welcker had no reason to suspect that during his long wait for a decision, the FBI intentionally obstructed the Air Force's efforts to administer justice and thereby deprived Petitioner of a fair hearing.

The only plausible way to harmonize Ware and the decision below would be to hold that claims sounding in tort are governed by a special rule of accrual. Barrett, as noted above, rejects that proposition. Petitioner knows of no published decision explicitly accepting it.

However, at oral argument in the court below, Judge Davis repeatedly admonished counsel against citing to tort cases because they arise under a different statute.[7] Consistent with Judge Davis' remarks, no published opinion of the Federal Circuit, its predecessor courts, or the Claims Court, cites to Kubrick as a precedent in construing limitations. Those

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7. The Federal Tort Claims Act involves no more liberal waiver of sovereign immunity than does the Tucker Act. No matter which act has been invoked, the courts consistently hold that the sovereign's waiver must be narrowly construed. If there nonetheless is a difference in accrual principles, the statute of limitations governing tort claims, 28 U.S.C. § 2401(b), would seem to leave less leeway for tolling of accrual than do the statutes applicable to Petitioner's case, 28 U.S.C. §§ 2401(a), 2501. Section 2401(b) provides that tort claims not timely filed shall be "forever barred," whereas no such language of repose applies to the claim at bar.

courts instead take as their controlling precedents pre-Kubrick decisions which do not sound in tort, such as Braude, supra. See, e.g., 11a.

D. The Federal Circuit stopped its analysis once it was satisfied that Petitioner could have litigated the truthfulness of adverse evidence disclosed at the hearings as well as the constitutionality in general of loyalty-security hearing procedures at the time he was discharged. The court refused to determine separately the accrual date for Petitioner's Sullivan claim, which is based solely upon the FBI's post-hearing reports.

This failure to independently ascertain the time of accrual of each

cause of action conflicts with the Ninth Circuit's decision in Raddatz v. United States, 750 F.2d 791, 795-97 (1984). There, the court of appeals reversed a grant of summary judgment to the government on one cause of action, because even though a related cause of action was time barred, this one had accrued at a subsequent date.

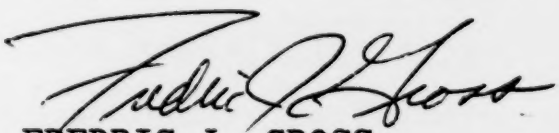
E. It is evident from the foregoing that conflicts and confusion have emerged in the post-Kubrick efforts of the courts of appeals to determine when claims against the United States accrue. Therefore, in addition to offering this Court an opportunity to correct the manifest injustice done Petitioner at a troubled time in this Nation's

history, this case provides an appropriate vehicle for clarifying an important and recurring question involving claims against the United States, namely, whether the Kubrick criteria for accrual are applicable to all causes of action.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit at docket number 84-1392.

Respectfully submitted,



FREDRIC J. GROSS
Attorney for Petitioner

June 10, 1985.

OPINION, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
January 22, 1985

Welcker v. United States, No. 84-1392
Before DAVIS, KASHIWA and NIES, Circuit Judges.

DAVIS, Circuit Judge.

Stanford Monroe Welcker appeals from a decision of the United States Claims Court, H. Robert Mayer, Judge, granting the Government's motion for summary judgment. Appellant seeks inter alia, an award of back pay under the Tucker Act for his allegedly wrongful discharge from civilian employment with the Air Force in 1950. The court ruled that appellant's case, filed in 1982, was barred by the six-year statute of limitations on suits brought under the Tucker Act. 28 U.S.C. § 2501 (1982). We affirm.

I

For the purposes of this motion for summary judgment, the Government does not take issue with appellant's version of the hard facts, which is as follows:

Following a tour with the Navy during World War II, appellant worked as a civilian draftsman in the Air Force's Watson Laboratories in Monmouth, New Jersey. Appellant maintains that, in 1944, an FBI agent and an Army Intelligence officer approached appellant and asked him if he would infiltrate and report on the activities of the Walt Whitman Club, a community organization suspected of supporting communist activities. Appellant states that he agreed, and attended a number of club meetings at the local YMCA.

In 1949, the Air Force informed appellant that he was suspended for disloyalty to the Government pursuant to

Public Law 77-808.[1] Welcker obtained counsel, and appealed the decision to the Laboratory's loyalty-security board.

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[1]. Pub. Law No. 77-808, 56 Stat. 1053 (1942), states in pertinent part:

> SEC. 3 The provisions of section 6 of the Act of August 24, 1912 (37 Stat. 555; U.S.C., title 5, sec. 652) [pertaining to procedures for the removal of Government employees], shall not apply to any civil-service employee of the War or Navy Departments or of the Coast Guard, or their field services, whose immediate removal is, in the opinion of the Secretary concerned warranted by the demands of national security, but nothing herein shall be construed to repeal, modify, or suspend the proviso in that section. Those persons summarily removed under the authority of this section may, if in the opinion of the Secretary concerned, subsequent investigation so warrants, be reinstated, and if so reinstated may, in the discretion of the Secretary concerned, be allowed compensation for all or any part of the period of such removal in an amount not to exceed the difference between the amount such person would normally have earned during the period of such removal, at the rate he was receiving on the date of removal, and the interim net earnings of such person: **Provided**, That within thirty days after such removal any such person shall have an opportunity personally to appear before the official designated by the Secretary concerned and be fully informed of the reasons for such removal, and to submit, within thirty days thereafter, such statement or affidavits, or both, as he may desire to show why he should be retained and not removed.

This Statute has been repealed. Pub. Law No. 81-

While the case was pending, appellant's attorney sent a letter to then FBI Director J. Edgar Hoover, requesting that the FBI confirm that appellant's participation in the Walt Whitman Club was at the behest of the Government. Hoover referred the matter to the main Justice Department. The Attorney General's office responded to appellant's counsel (in September 1949) by denying that the Government had recruited appellant as an informant. The Government claimed that appellant was already a member of the Walt Whitman Club at the time of his interview with the FBI agent and Army Intelligence officer. According to the Government's letter, a third, unnamed individual "interested in Mr. Welcker's welfare" had suggested that the FBI interview

appellant in an effort to persuade him to leave the communist fold. The Justice Department's letter added that "Mr. Welcker never made any report either written or oral, and when questioned regarding specific matters his answers were either evasive or erroneous."

The loyalty-security board held a hearing late in 1949, but refused to allow appellant either to examine the reports of the FBI investigation or to cross-examine Government witnesses. At the hearing, in response to questions from his attorney, appellant related his view of the events surrounding his participation in the Walt Whitman Club's activities, and denied being a communist. The loyalty-security board concluded that appellant was not disloyal; the board recommended, however, that the Air Force dismiss

appellant in the interest of national security. In 1950, after another hearing, the Air Force Central Loyalty-Security Board affirmed this determination, as did the Secretary of the Air Force, thereby converting appellant's suspension into a permanent termination. Appellant instituted no legal action at that time.

In 1979, after Congress passed the Privacy Act (5 U.S.C. § 552a), appellant requested a copy of his FBI files. The FBI provided portions of these files in 1981. According to appellant, the documents demonstrate that the FBI and the Justice Department purposely withheld from the Air Force their true role surrounding appellant's participation in the Walt Whitman Club. Moreover, it is asserted that the FBI failed to inform the Air Force that agents observing the club's members

often failed to distinguish between those entering the YMCA for club meetings and those entering for other purposes, including meetings of the union representing appellant and other government employees. The entire thrust of the materials, says appellant, shows that the FBI, in ex parte communications to the Air Force loyalty-security board, falsified its reports of appellant's activities, a state of affairs which appellant says he discovered only in 1981 when the FBI released his files.

The Claims Court ruled that, on the basis of the undisputed facts, appellant should have been aware of the FBI's alleged duplicity at the time of the loyalty-security board hearings themselves (1949-1950), at which the Air Force informed appellant that the FBI disputed his version of the story. The court pointed particularly to

appellant's Privacy Act request as evidence that appellant had pieced together his view of the FBI's actions long before appellant saw his file. In his request, appellant stated:

> The tenor of the questions put to me by the members of the loyalty-security board indicated that the reports filed by Hughes and Allen [the FBI and Army Intelligence agents] were at substantial variance from my sworn testimony . . . . I infer from the various board members' questions that Hughes and/or Allen destroyed some of the informant reports I provided them, and substituted fabricated accounts of my activities. These were designed to convey the impression that I was concealing useful information and providing false information as to the left-wing activities they had asked me to monitor.

Since appellant suspected that he had been discharged on fabricated evidence approximately thirty-one years before bringing this suit, the court ruled that plaintiff's action was time-barred on the authority of Braude v. United States, 585 F.2d 1049 (Ct. Cl. 1978), discussed infra.

II

Welcker concedes that actions under the Tucker Act are subject to a six-year statute of limitations, but relies on the rule that "the running of the statute will be suspended when an accrual date has been ascertained, but plaintiff does not know of his claim." Japanese War Notes Claimants Association v. United States, 373 F.2d 356, 358-59 (Ct. Cl. 1967), cert. denied, 390 U.S. 975 (1968). As a judicial interpretation of a legislative enactment, the rule is strictly and narrowly applied: "Plaintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence or it must show that its injury was 'inherently unknowable' at the accrual date." Id. at 359 (footnote omitted). Appellant argues that he could not have

known of the FBI's actions prior to passage of the Privacy Act and the submission of his request under that legislation.

The undisputed facts squarely belie that contention. The letter his then attorney received from the Department of Justice in 1949 plainly shows that the Government denied that appellant was a Government informant or supplied any useful information, and appellant's own 1979 statement (quoted supra) asking for his files demonstrates that at the time of the 1949-1950 hearings he already thought that (1) the FBI reports were very different from his own views of what had occurred and (2) the FBI reports had been fabricated against him. Clearly, appellant was aware in 1949-1950 that he had been dismissed from the federal service on grounds that he himself considered to be wrong and

improper.

This was enough to start the running of the six-year span of limitations. Cases from our predecessor court and other circuits firmly establish that the statute of limitations is tolled only so long as the plaintiff is unaware of the wrong committed. "Defendant is not required to wait until plaintiff has started substantiating his claims by the discovery of evidence. Once plaintiff is on inquiry that is has a potential claim, the statute can start to run." Japanese War Notes Claimants Association, supra.

In Braude, supra, the Government summarily dismissed plaintiff from her position in 1951 pursuant to a loyalty-security program similar to the one under which appellant lost his job. The Government informed petitioner at the time that her dismissal was due to a

reduction-in-force. Plaintiff finally confirmed the true reason for her dismissal in 1974 after requesting and examining her employment file under the Privacy Act. The court ruled, however, that certain clues plaintiff received should have put on notice as to the true cause of her dismissal:

> And so it becomes clear, and we conclude, that the evidence before us establishes, as a matter of law, that the statute of limitations began to run as plaintiff acquired information and evidence which should have, and in the eyes of the law did, place her upon inquiry, prior to September 12, 1971 [six years prior to her filing of the complaint], that she had a potential claim. This holds true notwithstanding plaintiff's contention that she did not have enough evidence to prove or substantiate her claim; for, just as plaintiff used the Privacy Act in 1974 as a means of acquiring the evidence needed to substcntiave her allgged claim, she could have filed her suit here and availed herself of the broad discovery powers afforded by this court to its litigants, and thereby have acquired the same evidence to prove her claim within the time allowed by the statute of limitations.

585 F.2d at 1054. In the instant case,

appellant knew the real reason for and the circumstances surrounding his dismissal at the time of the loyalty-security board hearings; he believed, for example, that the FBI had, in its eyes, lied as to his role of Government informant. As a matter of law, appellant at that time had sufficient notice of his potential claim to

commence the running of the statute of limitations.[2]

Recognizing his dilemma, appellant seeks to minimize the significance of the hearings. He argues that he never knew the FBI had in effect conducted a campaign against him until he saw his file in 1981. Until then, he merely presumed that the loyalty-security boards had chosen not to believe his explanations. Appellant's Privacy Act request, discussed supra, tends directly against this contention. Moreover, even granting the inference that appellant suggests, his explanation is not sufficient to warrant tolling of limitations.

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2. Braude is a fortiori to the present case because in Braude a substantial argument could be made that that employee never knew (until years later) that she had been dismissed on loyalty-security grounds. Appellant, in contrast, knew at the time that he had been removed on those very grounds, grounds he deemed to be false.

In Sandutch v. Muroski, 684 F.2d (3d Cir. 1982) (per curiam), plaintiff charged defendant-law enforcement officals with conspiring to violate his constitutional rights by obtaining false testimony against him through duress. The defendants pleaded that the statute of limitations had run. To the plaintiff's response that he had only recently discovered the details of the conspiracy, the court answered:

> We hold, however, that the record establishes, as a matter of law, that Sandutch had reason to know of the alleged conspiracy to secure false testimony as early as 1976, when he knew of [the witness] recantation . . . . Although at that time Sandutch may not have known all the facts necessary to establish that the defendants conspired to deprive him of his rights, his 1976 knowledge of the falsity of [the witness'] statement obtained under duress should have led, by the exercise of due diligence, to the awareness that he had a cause of action. The statute began to run then.

Id. at 254 (emphasis added).

Similarly, appellant cannot escape the fact that he strongly suspected in 1949-1950 that the FBI had lied in its reports to the Air Force. His wrongful discharge claim under the Tucker Act accrued at the time he became aware of the difference between his position and the FBI's -- in 1949-1950.

III

Appellant's primary argument on appeal is that the Claims Court misconstrued the nature of his case. His cause of action, he says, is based, not on the wrongful discharge per se, but rather on the alleged impermissible ex parte communications from the FBI to the Air Force at the time of the hearings. Appellant argues that, though he was aware of the existence of an FBI report to the Air Force at the time of the loyalty-security board hearings, he did not know that the FBI had (as he puts it) determined to take an adversarial or prosecutorial role in the proceedings. He thus claims to fit under the rule suspending limitations.

There are two reasons why this position cannot be accepted. The first is that appellant's claim against the Government under the Tucker Act cannot

be for a tort but must be because he was allegedly or improperly removed from his job. That claim of an illegal or improper removal he already knew he had by 1949-1950 when he knew the FBI's position was contrary to his and he believed that that agency had fabricated evidence. That was enough to file suit. Because 28 U.S.C. Section 2501 commences the Tucker Act's six-year limitations span when the "claim first accrues" (emphasis added), it is irrelevant for limitations purposes that Welcker may not have learned until later that he had further support for that same claim of an illegal or improper removal, i.e., that the FBI had allegedly also engaged in ex parte contracts.

The other reason for rejecting appellant's argument on alleged ex parte communications is that, in any event, the rule against such contracts

is inapplicable to this loyalty-security case. The principal precedent for this court's sustaining a claim of impermissible ex parte communications during an administrative proceeding is Camero v. United States, 345 F.2d 798 (Ct. Cl. 1965), and 375 F.2d 777, 780 (Ct. Cl. 1967). In that case, plaintiff was removed from his position as a civilian Army employee at a supply depot in Philadelphia after the Government charged him with falsely certifying travel vouchers and receiving bribes from contractors. A grievance committee investigated the charges and moderated the penalty. The depot commander, the ultimate deciding official, solicited comments from, among others, the Army attorney who had prosecuted the case before the grievance committee. He then reinstated the harsher penalty. The Court of Claims awarded plaintiff back

pay on the ground that the commander acted improperly in soliciting the attorney's comments.

The ground on which the court rested its holding in Camero was not, as plaintiff argues, that ex parte communications between an adverse Government agency and an administrative tribunal are always per se improper. Rather, the court ruled that by seeking the advice of an adverse party the decision maker had violated applicable regulations. "[P]laintiff's motion raises serious questions as to whether his dismissal was in compliance with the regulations governing army grievance proceedings. Clearly, the army was bound to comply with its own regulations." 345 F.2d at 805 and (in the second decision):

> The problem is, however, that both decisions were made, at least in part, on the basis of the ex parte communication of the opinion of

> Kostos, who certainly, albeit perhaps not consciously, had as an adversary more than a neutral stake in the final outcome of plaintiff's case. This is enough to require us to invalidate plaintiff's removal as being in violation of the regulations governing the Army grievance proceedings.

375 F.2d at 780 (1967) (emphasis added). See also Jarrett v. United States, 451 F.2d 623, 629 (Ct. Cl. 1971) ("It cannot be disputed that because the procedure used in this case was not pursuant to the agency's own regulations the action taken cannot stand"); Ryder v. United States, 585 F.2d 482, 486-87 (Ct. Cl. 1978) (trial-type hearing under Army grievance procedure); compare Grover v. United States, 200 Ct. Cl. 337, 350 (1973) ("Both Camero and Jarrett involved regulations which called for evidentiary-type hearings [not available in this case]"). The sum of it is that, in the Camero-type cases, the statute, regulations, or practice precluded ex

ex parte adversarial contracts.[3]

In stark contrast, appellant enjoyed the benefit of no such statute, regulations or practice under Public Law 77-808. He recognizes as much when he refers in his brief to the "modest procedural protections available to him under the statute." It is well-known that persons charged under that statute had, as its text indicates, no right to be confronted with the evidence against them or to have a trial-type hearing; rather, the hearing was very much truncated. In the only reported case discussing the procedural protections available under Public Law 77-808, the

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3. In one case reversing a dismissal on the ground of ex parte communications, Sullivan v. Dept. of the Navy, 720 F.2d 1266 (Fed. Cir. 1983), the court made no mention of particular regulations violated by the misconduct. The court did, however specifically quote the language in Camero which is set forth supra, and evidently believed that the whole structure of that employee-removal system precluded such communications.

court ruled that plaintiffs had no right to an open, trial-type proceeding. Deak v. Pace, 185 F.2d 997 (D.C. Cir. 1950). That court held that employees discharged under Public Law 77-808 were entitled only to "information sufficient to inform [them] with reasonable certainty and precision of the cause for removal." Id. at 999. The court rejected the plaintiffs' argument that the Government must disclose the entire record:

> But the statute on which appellants rely gives them no such right. The most it authorizes the court to require is that the Secretary furnish the additional information so that appellants will be fully informed; received and consider from each appellant such statement and affidavits as either may submit, and thereupon, on the basis of all the facts and circumstances before him. detgrmine"whether appellant should be "retained" and not removed from her position.

Id. at 1000.

Rather than the full hearing available to plaintiffs in Camero, Jarrett, and Ryder, Deak establishes that appellant's hearing was merely an opportunity for him to state his case. See Grover, supra. Given the absence in the statute, Air Force regulations, or practice of any greater procedural protections, appellant in this case cannot base his right to recover on the Government's breach of a legal obligation to provide an open forum for his appeal.

IV

Appellant argues that, even if he was fully aware of the FBI's alleged conduct at the time, the tenor of the times rendered any protest to the courts an exercise in futility and he should therefore not be penalized for his delay. But the statute of limitations is not tolled by litigative timidity.[4] At least two Supreme Court cases from the middle and late 1950's, in which the Court dealt with administrative schemes comparable to those established under Public Law 77-808 (Peters v. Hobby, 349 U.S. 331 (1955); Greene v. McElroy, 360 U.S. 474 (1959)), demonstrate that the courts in the 1950's were open to

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4. We note that, at the loyalty-security board hearing, appellant's then attorney eloquently and forcefully objected to the constitutionality of the proceedings on various grounds. The record reveals no reason why he did not pursue his legal rights in a timely fashion.

examine critically cases charging the Government with abuses designed to rid the Government ranks improperly of alleged "security risks." The decision granting the Government's motion for summary judgment is affirmed.

AFFIRMED

OPINION OF THE UNITED STATES CLAIMS COURT
April 27, 1984

Welcker v. United States No. 99-82C
Before H. Robert Mayer

MEMORANDUM ORDER

This case is here on defendant's motion for summary judgment after oral argument. There is no genuine issue as to any material fact, and the court concludes that the complaint is barred by the statute of limitations. 28 U.S.C. § 2501 requires that a case be filed in this court within six years of the accrual of a cause of action against the government. This complaint was filed at least 30 years after plaintiff knew the facts which he now alleges as the basis of his complaint.

When plaintiff's dismissal from the Air Force was proposed in 1949, he was given a bill of particulars of the

grounds. In September of that year, he was advised in a letter from the Assistant to the Attorney General that the government did not consider him to be an informant working for the FBI and Army Intelligence. The letter stated the government's view that plaintiff was a member of the Walt Whitman Club and that "it would not be accurate to state that his attendance at meetings of that club was at the request of [the Department of Justice], and for the benefit of the government." Further, the letter said that he "never made any report either written or oral, and when questioned regarding specific matters, his answers were either evasive or erroneous." At the hearing on December 5, 1949, plaintiff was told that the FBI and intelligence agents disputed his status as an informant and his contribution to their surveillance

efforts. All of this was at variance with plaintiff's version of the events precipitating the loyalty hearings and he knew that this was material to the Boards' deliberations. He also knew the identities of those contradicting him, and when he was discharged after appeal he knew the reason why.

This is confirmed by the letter plaintiff wrote as a request for documents under the Privacy and Freedom of Information Acts on April 20, 1979. In that letter he said,

> "The tenor of the questions put to me by the members of the loyalty-security boards indicated that the reports filed by Hughes and Allen [the FBI and Army intelligence agents] were at substantial variance with my sworn testimony . . . . I infer from the various board members' questions that Hughes and/or Allen destroyed some of the informant reports I provided them, and substituted fabricated accounts of my activities. These were designed to convey the impression that I was concealing

> useful information and providing false information as to the left-wing activities they had asked me to monitor . . . . [W]hen in 1949 I told Mr. Reid [an Army Intelligence official] that I was trying to locate Allen, Mr. Reid offered me no assistance, but did state that the reason for my suspension from duties was that I had not provided enough information to Lt. Allen."

All of this shows that before plaintiff received any FBI files in response to his Privacy and Freedom of Information request, he already possessed the information on which he bases his complaint here. It was not the documents released then that put him on notice that the government disavowed his claim that he was an informant. Those documents merely confirmed what he already knew.

This court will not assume as plaintiff asks that no court in the country in the early 1950's would have

afforded him sufficient discovery to pursue his claim. His rights in other courts aside, this court's predecessor, the Court of Claims, provided a salutary rule governing access to government documents if necessary to a more particular statement of his case. See Rule 13, printed at 126 Ct. Cl. 9 (1953). And knowing the identities of the persons contradicting his version of events would have been a strong start in the discovery of the precise position of the government. Plaintiff did not try that route and the court dismisses his assertion that it would have been futile.

Plaintiff's claim that the documents he received from the government in response to his Privacy and Freedom of Information Act request illustrate a fraud was perpetrated on the security boards or amounted to a conspiracy which

should toll the running of the statute of limitations is unavailing. Without accepting plaintiff's characterization of those documents, the court observes that the asserted result of the alleged fraud or conspiracy, the disavowal of his status as an informant and his performance, occurred before the first hearing. Even if, as he says, the claimed fraud continued thereafter, the damage was done then and plaintiff knew of it.

This case, therefore, is governed by Braude v. United States, 585 F.2d 1049 (Ct. Cl. 1978). Indeed, it is an even stronger case than Braude because plaintiff knew of the challenges to his version of events and who made them. And he admits that he was "told the true reason for his discharge from the start."

Acordingly, it is ORDERED that

defendant's motion for summary judgment is GRANTED and the case will be dismissed with costs to the prevailing party. See 28 U.S.C. § 2412(a); RUSCC 54(d).

H. ROBERT MAYER
Judge

April 27, 1984

JUDGMENT, UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
January 22, 1985

Welcker v. United States No. 84-1392
Before DAVIS, KASHIWA and NIES, Circuit Judges.

DAVIS, Circuit Judge.

JUDGMENT

ON APPEAL from the U.S. Claims Court

This CAUSE having been heard and considered, it is ORDERED AND ADJUDGED: AFFIRMED.

DATED January 22, 1985

ENTERED BY ORDER OF THE COURT
George E. Hutchinson, Clerk

/s/ George E. Hutchinson
Clerk

ORDER DENYING REHEARING,
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
March 11, 1985

Welcker v. United States No. 84-1392
Before DAVIS, KASHIWA and NIES, Circuit Judges.

DAVIS, Circuit Judge.

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ George E. Hutchinson,
Clerk

March 11, 1985
Date